IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1662

NATIONAL BLACK MEDIA COALITION,
CITIZENS FOR CABLE AWARENESS IN PENNSYLVANIA,
AND PHILADELPHIA COMMUNITY CABLE COALITION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EDWARD J. KUHLMANN
NOLAN A. BOWIE
Citizens Communications Center
1914 Sunderland Place, N.W.
Washington, D. C. 20036

CHARLES M. FIRESTONE
Communications Law Program
UCLA School of Law
Los Angeles, California 90024

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I N D E X

CITATIONS

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The National Black Media Coalition, Citizens For Cable Awareness In Pennsylvania, and Philadelphia Community Cable Coalition respectfully petition this Court to issue a writ of certiorari to the judgment of the United States Court of

Appeals for the Eighth Circuit in Midwest Video Corporation v. Federal Communications Commission No. 76-1496 and No. 76-1839 decided February 21, 1978.

OPINIONS BELOW

The Opinion of the Court of Appeals, dated February 21, 1978, has not yet been officially reported. The Federal Communications Commission's Report and Order: the Cable Television Channel Capacity and Access Channel Requirements is reported at 59 F.C.C. 2d 294 (1976). The FCC's Memorandum Opinion and Order, denying petitions for reconsideration of the Report and Order is reported at 62 F.C.C. 2d 399 (1976).

The full texts of the opinions below are printed in the separate appendix to the Petition for Writ of Certiorari filed by the FCC in these cases on May 4, 1978, FCC v. Midwest Video Corporation, et al. (No. 77-1575). For convenience, references herein will be to the FCC's Appendix ("FCC App.").

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1978. A stay of mandate was granted by the court by order dated April 4, 1978 [FCC App. D]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and 28 U.S.C. §2350(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fifth Amendments are set forth at the end of this petition.

Sections 1, 2(a), 3(h), 303(g), 303(r) and 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§151, 152(a), 153(h), 303(g), 303(r) and 307(b), are set forth in FCC App. E.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's rules which require access to cable channels for public, educational, governmental and lease uses on cable television systems that transmit over-the-air broadcast signals and have 3500 or more subscribers, are within the Commission's regulatory authority granted in the Communications Act of 1934, as amended.

2. Whether the Commission's regulatory scheme for cable television access uses is prohibited by the First or Fifth Amendment.

STATEMENT

This petition seeks review of an opinion and judgment of the Eighth Circuit Court of Appeals that the Federal Communications Commission lacks authority to promulgate rules requiring access to cable television systems for public, educational, governmental, and lease uses.

The access rules were initially promulgated by the Commission as another means of fostering local expression. In fact, the access uses were tied to the cable program origination rule upheld in U.S. v. Midwest Video Corporation 406 U.S. 649 (1972) because it was assumed that the same equipment would be used for both kinds of programming. With the elimination of the mandatory origination requirement in 1974 (49 F.C.C.

2d 1090) the access rules became the sole means of providing local outlets for local expression on a small part of the abundant channels which cable technology provides. This petition is premised on the assertion that the Eighth Circuit was faced here with essentially the same exercise of regulation that it was faced with when it set aside the origination rules. Petitioners will demonstrate that the circuit court was similarly incorrect in its action in setting aside the access rules as it was found to be by this Court in Midwest Video in setting aside the origination rule.

A. Cable Television Systems

From the earliest beginnings of cable television regulation by the Federal Communications Commission it

was evident that cable systems were part of interstate communications by wire. Carter Mountain Transmission Corporation v. FCC, 321 F.2d 359 (D.C. Cir. 1963). Coaxial cable, the kind of cable currently employed by cable or CATV systems to transport video signals, is capable of carrying television or radio broadcast signals to a subscriber relatively free of interference. Television signals are received off-the-air at the system antenna. Through the use of a conventional television antenna, or, through the use of microwave relay systems or satellite, signals may be imported from remote television markets.[1/] Once

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1/ The Commission's rules now permit to some extent the importing of signals from any region of the country to another. 47 C.F.R. §76.61(b) (1976). To facillitate this (cont. on next page)

received at the system antenna or "head-end," the broadcast signals are carried simultaneously over the air to the subscriber. The subscriber then selects the channel to be viewed on his television set. 2/ A system

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1/ (cont. from previous page) movement of television signals a band of frequencies have been set aside specifically for use by cable systems. 47 C.F.R. §78.18 (1976) reserves from 12.70 to 12.95 GHz for this use. Similarly, frequencies are assigned to cable television satellite earth stations that will receive programming via satellite. See 47 C.F.R. §§25.103, 25.202 (1976).

2/ The number of television channels that can be delivered to the home is ever changing. See Jones, Patents: Versatile Cable for Light Waves, N.Y. Times, March 11, 1978, at 31, col. 1.

is not limited to supplying over-the-air broadcast signals. Other channels on a cable system can be leased by the CATV operator to anyone desiring to have special programming carried to the system's subscribers. The program can be video tape recorded and transmitted at the CATV head-end, or it can originate "live," to be carried by closed circuit means (i.e. cable and terrestial or satellite relay to the head-end for transmission).

B. The Access Rules

The Federal Communications Commission's access scheme embodied in the rules under review was initially promulgated in 1972 and applied only to cable television systems[3/] operating

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3/ The Commission's cable television regulations apply only to those cable television systems (cont. on next page)

in a community located in whole or in part within the 100 largest television markets. Cable Television Report and Order, 36 F.C.C. 2d 141, 189, 244 (1972). The current access rules apply to cable television systems having 3500 or more subscribers regardless of their proximity to a television market.[4/] Additionally, the number of access channels required has been reduced by the amended rules.

In general, the rules (47 C.F.R. §§76.252, 76.254, 76.256, 76.258 and

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3/ (cont. from previous page) that distribute signals of one or more television station to subscribers. 47 C.F.R. §76.5(a) (1976). See Riverside Cable Corporation, 42 F.C.C. 2d 783 (1973).

4/ Midwest Video Corporation, the petitioner in the Eighth Circuit, operates cable television systems that have 3500 or more subscribers.

76.305 [FCC App. 168-177, 202-203]) provide that cable television systems which have 3500 subscribers or more and are built after March 31, 1977 must be technically capable of providing radio bandwidth sufficient to accomodate 20 television channels. 47 C.F.R. §76.252 [FCC App. 168]. If the cable system is now in existence the operator has until June 21, 1986 to achieve the 20 channel capability.

Then if there is sufficient demand, the cable system must dedicate portions of the required radio bandwidth to specific video uses designated in the Commission's access rules. Assuming adequate demand and sufficient channel space, the cable system must provide: (1) a "public access channel" which is restricted to non-commercial uses on

a first come, non-discriminatory basis; (2) an "educational access channel" for use by educational authorities; (3) a "local government access channel" for local government uses; and (4) a "leased access channel" for leased access uses. 47 C.F.R. §76.254(a) (1976) [FCC App. 169-170]. However, until there is sufficient demand for the designated uses, or if an existing system before 1986 lacks technical capability, only one channel needs to be provided to serve all the designated access uses. When that channel is not in use for designated access, the system can use the channel or channels for other broadcast or non-broadcast purposes. 47 C.F.R. §76.254(b) (1976) [FCC App. 202]. Existing systems without adequate bandwidth need only provide

channels to the extent possible. 47 C.F.R. §76.254(c) (1976) [FCC App. 171].

To assist in the development of public access uses, the cable operator must have available equipment for local production and presentation of cablecast programs. 47 C.F.R. §76.256(a) (1976) [FCC App. 172].[5/] The Commission also assumes that the operator will have a room or part of a room on a part-time basis for program production [FCC App. 146].[6/]

5/ While cable operators with 3500 subscribers have not been required to originate programming since 1974, they must continue to provide as they always did, access production equipment. Cable Television Service, 49 F.C.C.2d 1090 (1974).

6/ Additionally, the employment of the channel for governmental and educational uses is to be free for five years after the system first offers channel time for such cablecasting purposes
(continued on next page)

C. This Court's Consideration of the FCC's Jurisdiction Over Cable Television

On two previous occasions the Court has considered the FCC's authority to regulate cable television within the Communications Act of 1934. United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (Southwestern); United States v. Midwest Video Corporation, 406 U.S. 649 (1972) (Midwest Video).

6/ (cont. from previous page) 47 C.F.R. §76.256(c)(1) [FCC App. 173] and, public access uses of channel space are always to be made available without charge. 47 C.F.R. §76.256(c)(2) [FCC App. 173]. However, the equipment, personnel, and production of all access programming is subject to reasonable charges, except for the first five minutes made for live "public access" programming which is to be free. 47 C.F.R. §76.256(c)(3)[FCC App. 173]. Of course, leased uses by definition, must pay for both the channel and production costs. The public, educational, and leased access uses - but not the governmental uses - are subject to operating rules. 47 C.F.R. §76.256(d) [FCC App. 173-175]. (cont. on next page)

In Southwestern, the scope of the Commission's regulatory responsibilities was found to be ". . . to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'" 392 U.S. at 168 [footnotes omitted]. Further, the Court pointed out that it was uncontroverted that cable television systems are within the statutory definition of "communication by wire or radio," 47 U.S.C. §§153(a), (b), and that there is no ". . . doubt that CATV systems are engaged in interstate communication."

6/ (cont. from previous page) The Commission has also prohibited state or local entities from exceeding the federal requirements without express Commission authorization. 47 C.F.R. §76.258 [FCC App. 175-176].

Ibid. The Court characterized cable systems' interstate elements as being ". . . a stream of communication [which] is essentially uninterrupted and properly indivisible." Id. at 169.

The petitioners in Southwestern argued that while cable systems came within the definitions and authority of the Communications Act, they could be regulated only if they were common carriers within Title II of the Act or broadcasters within Title III. They urged further that if, as is true of cable television, it possessed hybrid characteristics of both, then it could elude the Act's grasp.

The Southwestern Court concluded that the Act could not be construed so restrictively, and ". . . found no reason to believe that §152 does not,

as its terms suggest, confer regulatory authority over 'all interstate. . . communication by wire or radio.'" Ibid.

This Court then recognized the legitimacy of the Commission's objectives in exercising its authority over cable television as follows:

> Moreover, the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. Congress has imposed upon the Commission the "obligation of providing a widely dispersed radio and television service," with a "fair, efficient, and equitable distribution" of service among the "several States and communities." 47 U.S.C. §307(b) . . . . The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have

> at least one television station as an outlet for local self-expression." Id. 392 U.S. at 173-174.

While the Commission's concern in Southwestern was with the potential harm cable television might cause to existing local service, this was not the case in Midwest Video. There, the Court agreed with the Commission that it need not limit its regulation of cable to "'. . . avoidance of adverse effects,'" but that its authority extended to "'. . . requiring CATV affirmatively to further statutory policies.'" 406 U.S. at 653, 664 [quoting Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C. 2d 417, 422 (1968)].[7/] At issue in

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7/ The Court, reiterated this view again in its opinion citing the preceding analysis from Southwestern, by stating that (cont. on next page)

Midwest Video was whether the Commission could require cable systems to originate programming. The Court then considered if the Commission could reasonably concern itself with whether a CATV operator "satisfactorily meets community needs within the context of [his] undertaking." Id. at 670. The Court concluded that this was a valid Commission concern and that the requirement for cable systems to originate programming was a reasonable exercise of its interest in cable systems.

D. The Eighth Circuit Decision

The Eighth Circuit here, however, in determining whether the access rules met a similar Commission concern for

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7/ (cont. from previous page) the Commission's authority to regulate CATV was "with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." Id. at 667.

local community needs, found the rules "designed to force [cable systems] into activities not engaged in or sought, [and into] activities having no bearing, adverse or otherwise, on the health and welfare of broadcasting." [FCC App. 28]. The access regulations, the Court believed, would "profoundly [alter] the obligations of a private business, requiring a fundamental change in its nature. . .," [FCC App. 44]. In sum, the Court was unable to find any statutory authority, valid regulatory objective, or lawful purpose to the rules. The court stated in dictum, that had the case not been decided on the jurisdictional issue, the rules would fail because they would be unconstitutional under the First and Fifth Amendments.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's opinion and holding setting aside the cable access rules for lack of statutory authority is in direct conflict with U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968) and U.S. v. Midwest Video Corp., 406 U.S. 649 (1972). It is also apparent that the Eighth Circuit's determination is inconsistent with other circuits' readings of those cases.

Furthermore, the circuit court's view of the FCC's authority to regulate cable systems, if allowed to stand, would severely handicap the Commission in regulating the developing technology of cable television in the public interest. Additionally, the court's view that the access rules violate the

First Amendment raises a novel and important First Amendment question.

For the reasons which follow, the petitioners urge that the Court grant certiorari, and that it summarily reverse the circuit court on its jurisdictional holding.

I.

The Eighth Circuit misinterprets the scope of the Commission's authority over cable systems as stated by this Court in the Southwestern and Midwest Video cases. Specifically, it is the circuit court's view [FCC App. 20-21] that the statute provides no specific grant of authority to the FCC to regulate cable television systems. Instead, the circuit court holds that decisions of this

Court have limited the Commission's authority over cable systems to such an extent that only regulations protecting existing television signals or requiring cable systems to act in a manner similar to television stations are permissible.[9/] This view is flatly contrary to this Court's reading of the Act in Southwestern

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9/ The circuit court later dismisses any possible basis for regulation of cable systems, presumably even that approved in Midwest Video and Southwestern, when it concludes that "[i]n retransmitting broadcast programs, cable systems use no 'limited and valuable part,' or any other part, of the federal public domain" [FCC App. 41]. The court makes this finding despite the fact that Midwest Video and Southwestern, if they stand for anything, stand for the proposition that cable systems are part of interstate communications by wire and that they make use of broadcast signals and radio frequencies which do belong to the public, and that their use incurs certain obligations to meet the Act's objectives.

that the Act includes within its regulatory ambit transmission of signals, pictures, and sounds of all kinds whether by radio or cable, and authority to regulate cable systems is within the Commission's responsibilities found in other sections of the Act. Id. 392 U.S. at 172.[10/]

The Eighth Circuit found no more merit to the Commission's objective to increase local self-expression through access channels than it did when it reviewed the origination rule. However, faced with this Court's approval of increased outlets for community self-expression as a valid objective in Midwest Video, the circuit court stated

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10/ The Southwestern Court also dismissed the notion that activities not mentioned specifically in the Act were not within the Commission's power. Ibid.

that unless the operator both controlled the programming and could charge for it, access origination did not serve the same objective as origination initiated by the cable system operator [FCC App.29-30]. Outlets, if not controlled by the operator, the court indicated, were not supported by the statute; were divorced from over-the-air broadcasting; and amounted to "a crusade to create a public right to use cable facilities" [FCC App. 32-39 (emphasis in original)]. In actual fact, the circuit court never examined the relevant statutory sections relied upon by the Commission and this Court in Midwest Video.[11/]

11/ The Midwest Video Court held that the "composition of radio traffic" (Citing National Broadcasting Co. v. United States, 319 U.S. 190, 215-216.) is up to the Commission, and that the widest possible dissemination of information from diverse (cont. on next page)

The circuit court also argued that cable regulations must be analogous to television broadcast regulations. Thus, the court reasoned, if the Commission cannot require over-the-air broadcasters to provide channels for access uses, then it cannot validly justify this regulation of cable. This argument was dismissed as being without merit in Midwest Video.[12/]

11/ (cont. from previous page) sources is a basic tenet of national communications policy. 406 U.S. at 668. Moreover, none of the statutory sections relied upon by the Court in Midwest Video, §§303(g) and 307(b), even allude to the distinctions raised by the circuit court.

12/ There the Court stated: "CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking." 406 U.S. at 670.

The Eighth Circuit should have focused on whether access to some of cable's multiple channels is a legitimate means to ensure that cable systems satisfactorily meet community needs.[13/]

13/ The circuit court also believed the access requirements to be common carrier regulations prohibited by 47 U.S.C. §153(h), which provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." The court's application of this section makes no mention of the hybrid nature of cable. If the circuit court had made a valid inquiry into the common carrier nature of the access rules it would have found that they fail to provide mandatory access. In fact, access uses have third priority to cable channels after broadcast signals and pay cable programming by the operator; they are subject to rules of operation in which the system operator exercises some control; and they are limited to four channels no matter how many channels are available on the system and no matter how great the demand. See Frontier Broadcasting (cont. on next page)

Additionally, the Eighth Circuit's view of the Commission's authority over cable systems is contrary to three other circuits' assessment of the holding of Midwest Video: National Association of Regulatory Utility Commissioners v. F.C.C., 533 F.2d 601, 615 (D.C. Cir. 1976) ("Since a prime purpose in the area of broadcast regulation is the assurance of variety in what appears on the home viewer's screen. . . 'suitably diversified programming' is within the ancillariness standard [applied to cable]."); Brookhaven Cable TV, Inc. v. Kelly, Nos. 77-6165 and 77-6157 (2nd Cir.) decided March 29,

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13/ (cont. from previous page) Co. v. Collier, 24 F.C.C. 251, 254 (1958). (This is not to say, however, that were these restrictions not present that 3(h) would prohibit access uses. Petitioners argued below that these limitations are unreasonable and unnecessary, given the hybrid nature of cable systems.)

1978, Slip Op. at 2164 (Approved the Commission's policy permitting pay cable to be free of price restraints as being within the program diversity standard of Midwest Video.); Home Box Office v. FCC, 567 F.2d 9, 46 n. 81 (D.C. Cir. 1977) cert. denied 98 S. Ct. 111 (Noted that this Court indicated in Midwest Video that the Commission could direct sharing of cable channels for access purposes.); and American Civil Liberties Union v. FCC, 523 F.2d 1344, 1351 (9th Cir. 1975). (Made the same observation as Home Box Office about whether access channels were permissible regulation within Midwest Video.)

II.

The circuit court stated that "... it [was] unnecessary to rest [its] decision on constitutional grounds..." and it there-

fore "... decline[d] to do so" [FCC App. 64]. But the court then stated that while it found "... it unnecessary to resolve the serious constitutional issues raised ... potential incursions into sensitive constitutional rights..." require careful scrutiny [Id. at 65]. The court then abandoned its obligation to avoid reviewing unnecessary constitutional questions and indicated that the rules would be impermissible on the present record [FCC App. 74]. The court addressed three constitutional issues: whether cable systems are entitled to the same First Amendment rights as "other private media"; whether in a First Amendment context "compelled" access to cable facilities is different from "compelled" access to broadcast facilities; and whether the cable access operating rule

which prohibits obscenity is a prior restraint. In spite of its concession that it was without the Commission's views on the matter, the court reasoned that Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), would govern the resolution of the questions posed, necessitating a finding that the cable access rules are violative of the First Amendment.

A key to the circuit court's analysis of the First Amendment issues is its assessment that cable systems are "private media" like newspapers or movie houses [FCC App. 72]. However, if the Court should find that the Commission has jurisdiction to require access channels, the circuit court would have to conclude that cable television is not private media and that Tornillo

is inapplicable. See Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969); CBS v. Democratic National Committee, 412 U.S. 94 (1973). Accordingly, the present status of this case, in light of the Eighth Circuit's treatment of the First Amendment questions, necessitates this Court's review of those issues in addition to the challenge to the Commission's jurisdiction.

Finally, of importance to reviewing the lower court's consideration of this issue is the Commission's current reconsideration of the propriety of the obscenity restrictions addressed by the Eighth Circuit. Currently, the rule is before the Commission following a remand from the District of Columbia Circuit and the Commission's actions on remand may very well moot the need for

this Court's consideration of the First Amendment issue presented by the obscenity rule. ACLU v. FCC, No. 76-1695 (D.C. Cir.) remanded August 26, 1977 (where the Commission gave every indication to the court that it was considering repealing the rule which requires that the operator have some control over access channel content).

CONCLUSION

When viewed in light of this Court's approval of the Commission's jurisdiction over cable television in Southwestern and Midwest Video, the Eighth Circuit was clearly incorrect in finding that the cable access rules are outside the FCC's authority. Further, it is an issue which other circuits, in applying those cases to analogous questions, have resolved in a manner diametrically

opposed to the Eighth Circuit's view. While there is no further need for the Court to give extensive consideration to the jurisdictional issue again, certiorari should be granted and the Eighth Circuit's opinion should be summarily reversed on the jurisdictional issue. If the decision is allowed to stand, the promise that cable offers to alleviate spectrum scarcity will be outside the Commission's jurisdiction, and this Court's refusal to review the instant cases would serve as a clear indication to other circuits that cable regulations which forward the long held communications objective to enlarge local outlets are outside the FCC's authority.

Such a result would undoubtedly lead to myriad variations of local and

state regulations thereby frustrating a new nationwide cable communications service.

For the foregoing reasons the petitioners respectfully request that the Court grant certiorari and summarily resolve the jurisdictional issue.*

Respectfully submitted,

Edward J. Kuhlmann
Nolan A. Bowie

Citizens Communications Center
1914 Sunderland Pl., N.W.
Washington, D.C. 20036

Charles M. Firestone

Communications Law Program
UCLA School of Law
Los Angeles, California 90024

May 22, 1978

* The petitioners wish to acknowledge the participation and assistance in the preparation of this petition of Gary Meyer, student, UCLA School of Law.

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.